

In the Supreme Court of the  
Hawaiian Islands.

SEPTEMBER TERM, 1895.

JAMES I. DOWSETT vs. MAUKAALA,  
NAAE, KAUMAEA, HINA, ELIKAI  
AND KALUAHILLO.Before JUDD, C.J., FREAR, J., and J.  
A. MAGOON, Esq., a member of  
Bar, in place of Bickerton, J.,  
absent from illness.A new trial will not be granted on the  
grounds that a mixed jury was not  
drawn alternately as directed by the  
statute, no objection having been taken  
to the method of drawing until after  
the jurors had been examined on their  
voir dire and accepted, and the party  
afterwards objecting to such drawing  
not having been prejudiced thereby.Tenants were living on an ahupuaa of land  
by permission of the chief or konohiki  
under the old tenure previous to the  
Land Commission. Such possession is  
presumed to continue to be permissive  
after the award of title to the owner of  
the ahupuaa, unless acts are shown  
which would render the possession adverse.The defendants contend that the record  
disclosed a joint judgment against  
them, whereas their occupation was  
separate. Held, as the point did not  
come to the Appellate Court in the bill  
of exceptions, it cannot be considered.

## OPINION OF THE COURT BY JUDD, C. J.

For a statement of the plaintiff's  
title see Dowsett v. Maukalea et al., 9  
Haw. 233. On the last trial of this  
case the Circuit Judge presiding  
charged the jury that the evidence  
showed that the entry of the defend-  
ants or their ancestors was a permis-  
sive one, they holding subject to the  
chief or konohiki and that there was  
no evidence to establish their posses-  
sion as adverse to the plaintiff, and  
the jury returned a verdict for plaintiff  
without leaving their seats. The case  
comes to us on a bill of exceptions. The  
first part of the bill is objection-  
able because not exhibiting in detail  
the various exceptions taken during  
the trial, but referring to them as to  
appear in the stenographer's notes  
when presented. See our decision on  
such a bill of exceptions in Kapua  
kela v. Iaea, filed July 26, 1895, and in  
De Fraga v. Portuguese Mutual Ben.  
Soc., filed October 18, 1895.As this bill was allowed before a  
decision of this Court upon this ques-  
tion, we consider the only point raised  
in this connection. The case called  
for a mixed jury. The defendants' *coun-  
sel* claims that the trial court  
erred in not drawing the names of the  
Hawaiian and foreign jurors alterna-  
tely from the box. The clerk's  
minutes do not agree in every respect  
with the notes of the stenographer.  
We account for this from the omission  
of the stenographer to note, in the dis-  
cussions between the Court and the  
counsel for defendants, Mr. Rosa, all  
that transpired. The best conclusion  
we can come to is that the objec-  
tion to the court's allowing the  
jury to be drawn as it was,  
that is, all the six Hawaiians  
first, and then six foreigners, was not  
formally made until after they had  
been sworn on their voir dire and  
accepted. Without deciding whether  
the statute which prescribes that the  
mixed jury must be drawn alternately  
(Compiled Laws, p. 359) is mandatory  
or directory, we hold that the objec-  
tion was waived by accepting the jury.  
Counsel, if he insisted upon the objec-  
tion, should have moved that the jury  
be discharged and a new jury drawn.  
We cannot find that the method pur-  
sued by the court prejudiced the de-  
fendants in any way, and we overrule  
the exception on this point.The Judge's charge is as follows:  
"Gentlemen of the jury, this is the  
third trial of this case, the first trial  
being before Judge Whiting, for which  
a verdict for the defendants was ren-  
dered. A new trial was granted by  
Judge Whiting and his order was  
sustained by the Supreme Court, and  
the decision of the Supreme Court in  
that case has now become the law in  
this case. The trial which took place  
before myself in November resulted  
in a disagreement; at that time the  
plaintiff asked for instructions which  
practically amounted to the statement  
of the law of the case as rendered by  
the Supreme Court, but for fear that  
there had been evidence different from  
the trial upon which the decision of  
the Supreme Court had been based, I  
declined to give the instructions  
asked for and sent the case to the jury.  
After a more careful review of the  
evidence, in the former case and  
strict attention to the evidence as  
given in this case, I am inclined to  
the opinion that my giving the case to  
the jury in the former trial was  
error under the instructions which I  
did give.The plaintiff in this case has shown  
you by a direct chain of paper title  
that he is the owner of this portion of  
the ahupuaa of Halaia; those docu-  
ments are *prima facie* evidence of  
their contents and would vest the  
title in the plaintiff subject to any  
adverse possession which the defend-  
ants might have shown you.Adverse possession is of two or three  
qualities; first, where a man goes into  
possession under a paper title with a  
claim of title; second, by oral agree-  
ment; third, as a mere usurper.  
Where the occupation has been with  
the permission of the owner of the  
land, in order that adverse possession  
may begin to run it is necessary that  
some direct notice be given to the  
owner that the occupier is holding  
hostile to himself.The statute of limitations which is the  
basis of adverse claims, is in the  
nature of a penalty and is never en-  
forced unless it is shown that the  
owners of the land have slept upon  
their rights for the period of twenty  
years.I feel compelled to instruct you as a  
matter of law, that the evidence has  
shown that the entry of these persons  
or their ancestors was a permissive  
one; that they held subject to the  
chief or konohiki, and that there is  
no evidence to establish adverse pos-  
session in this case, the defendants  
having failed to occupy the land noto-  
riously and completely, — continu-  
ously for the requisite period of twenty  
years adversely to the claim of the  
plaintiff."

The defendants claim that the court

erred in relying upon the original per-  
missive entry of the defendants' an-  
cestors, such permissive entry ante-  
dating the award of the Land Com-  
mission under which the plaintiff  
claims. The argument is made that  
as adverse possession prior to an  
award of the Land Commission can-  
not be tacked on to adverse posses-  
sion subsequent to that date in order  
to make out the full period of twenty  
years (Kanaia vs. Iong 3 Haw. R.  
332) so the adverse possession cannot  
be defeated by permissive acts or pos-  
session or entries antedating the  
award. In other words the possession  
of a person living on land by permis-  
sion of the chief before he obtained a  
paper title to the land cannot be con-  
sidered in law as continuing to have  
this permissive nature.We cannot agree with this conten-  
tion. The Land Commission was a  
court and had full jurisdiction to set-  
tle all claims to land, whether by  
claimants of the larger divisions of  
land as divided in ancient times by  
name, or by the hoainas or natives  
living on the lands under the chiefs.  
If the Land Commission expired and  
the hoainas or native tenants neg-  
lected to present their claims for the  
parcels of the land which they desired  
and for which they would ordinarily  
be awarded a kuleana title, showing  
merely their occupation of the same  
as a foundation for it, we think they  
must be considered as content with  
their prior status as tenants by permis-  
sion of the land owner. Such tenancy  
would therefore, in law, be consid-  
ered as continuing until some act of  
theirs changed their holding from the  
permissive nature to one of an adverse  
or hostile nature. The evidence shows  
that the defendants thought they had  
a right to the land because they had  
lived on it so long.The legislation in behalf of the  
native tenants was extremely liberal.  
We call especial attention to an Act  
passed on the 6th August, 1890, where  
fee simple titles free of commutation  
were authorized to be granted to all  
native tenants or hoainas for the  
land occupied and improved by them  
whether the same were portions of  
government lands or land held by the  
king or any chief or konohiki. House-  
lots, not in Honolulu, Lānae or  
Hilo, not exceeding one quarter of an  
acre, were authorized to be granted  
and the cultivated ground or kalo  
lands were limited to those actually  
cultivated by the applicant. In *Oui  
v. Meek*, 2 Haw. 87, this Court held  
that the Act repealed the former leg-  
islation and the ancient tenure, but in  
the 7th section preserved to the peo-  
ple, whether hoainas by ancient  
custom or kuleana holders, certain  
specific rights as to take firewood,  
house timber, thatch, &c., for their  
own use. Judge Robertson says that  
this Act had for one of its purposes  
"the protecting the hoainas in the  
enjoyment of certain rights therein  
enumerated as against the sweeping  
operation of the konohiki's allodial  
titles." In *Haseles v. Montgomery*,  
14 62, the court held that the sale of a  
portion of an ahupuaa gave to the  
grantee as a tenant or hoainas of the  
ahupuaa a common right of piscary in  
the fishing ground adjacent; and that  
in the meaning of the law regulating  
fisheries, a tenant was any one occu-  
pying "lawfully" any portion of the  
ahupuaa.The argument might be made that  
the grant of these specific rights, at-  
tached to all persons living on any  
ahupuaa, whether kuleana holders or  
not was inconsistent with their hold-  
ing as tenants at will of the land  
owner.This use of the word "lawful" shows  
that the court did not intend to hold  
that any person living without right  
on the ahupuaa whether a kuleana  
holder or not, had the specific rights  
granted to the people. To entitle a  
person to such rights he must be a  
"lawful" occupier, that is, have some  
title whether by being the holder of a  
kuleana, or having purchased a por-  
tion of the ahupuaa, as was the case  
before the court, or by some other law-  
ful tenure. Now, if the hoainas so  
called, without paper title by kule-  
ana, remains on the land after his per-  
missive occupancy has ceased either  
by notice to quit or by his own act  
of refusing to attend, he cannot be  
considered as being a "lawful occu-  
pier" and entitled to the specific  
rights of the people above set forth.  
It seems to us that these specific  
rights on an ahupuaa must be con-  
fined to those who have lawful right  
to reside there whether upon kule-  
anas or by the will of the owner. To  
say that the old tenure by will of the  
chief or konohiki became an adverse  
holding as soon as the chief or konohi-  
ki received his title to the land and  
this without notice on the tenant's  
part that he held thenceforth adver-  
sely, would give such person holding  
thereafter for twenty years, to all in-  
tents and purposes, as perfect a title  
to the land he held as if he had ap-  
plied for and received a fee simple  
title, and he would be thus be saved  
the expense of procuring such title.  
The law did not intend thus to  
favor those who slept upon their rights.By the evidence the holding of  
these defendants became adverse in  
1885 when they refused to pay rent.  
The statute began to run then. This  
suit interrupts it. We think the  
Judge's charge was right and was  
warranted by the evidence.The last point to be considered is  
that the record discloses that a joint  
judgment has been obtained against  
defendants who lived separate and  
apart from each other upon the same  
ahupuaa not claiming jointly or as  
tenants in common; but each for him-  
self on a distinct portion of the ahupuaa  
acquired by him, it may be of  
the same grantor, but at different  
times and under different circum-  
stances.This point, not having been raised  
at the trial below and not being cer-  
tified to us in the bill of exceptions, we  
do not feel at liberty to consider it.We overrule the exceptions.  
C. Brown for plaintiff; W. A. Kin-  
ney for defendants.

Honolulu, November 12th, 1895.

## The New Church.

Rev. T. D. Garvin will probably  
hold the first service in the new  
Christian church next Sunday.  
The Australia brought the windows  
for the building, and the work will  
probably be pushed to completion  
during the present week.In the Supreme Court of the  
Hawaiian Islands.

SEPTEMBER TERM, 1895.

A. V. GEAR and B. L. FINNEY vs.  
G. C. KENYON and E. NORRIE.

## IN EQUITY.

Before JUDD, C. J., FREAR, J., and  
Circuit Judge WHITING, who sat  
in place of Mr. Justice Bickerton,  
absent from illness.The title to a newspaper, the "Evening  
Bulletin," which is incorporated in the  
publication of a newspaper entitled  
"The Independent."Property in a trade-mark cannot be ac-  
quired or retained independently of the  
article which the trade-mark symbol-  
izes.Intentional abandonment of the use of a  
trade-mark is intention of the abandon-  
ment of the right to the trade-mark.

## OPINION OF THE COURT BY JUDD, C. J.

A. V. Gear was the proprietor of a  
newspaper called the "Independent."  
B. L. Finney was the proprietor of a  
newspaper called the "Evening Bul-  
letin." On the 17th June last these  
two persons formed a partnership,  
merged the two papers into one and  
the partnership published a news-  
paper under the title "Evening Bul-  
letin" with which is incorporated the  
"Independent." The defendants there-  
after published a newspaper under the  
title "The Independent."The plaintiffs' bill against defend-  
ants alleges *inter alia* that the plain-  
tiffs secured a "copyright" for the  
title of the newspaper the "Evening  
Bulletin" with which is incorpo-  
rated the "Independent," and applied  
for but failed to secure copyright for  
the title "The Independent"; that  
Gear is the original author of the title  
the "Evening Bulletin" with which is  
incorporated the "Independent"; that  
on the 24th June last the defendants  
published a newspaper called "The  
Independent," though notified by  
plaintiffs that they would consider it  
an infringement of their copyright,  
and that they had never abandoned  
the title "The Independent," but in-  
tended to preserve the same for them-  
selves in their newspaper business,  
and plaintiffs pray that the defend-  
ants may be enjoined from publishing  
any newspaper under the title "The  
Independent."The defendants demurred and the  
demurrer was sustained by Circuit  
Judge Cooper on the points that the  
bill shows no infringement and shows  
an abandonment of the title "The  
Independent." The case comes to us  
on these points alone, the plaintiffs  
waiving other points which were  
ruled in their favor.A few principles of law may here be  
stated. The right to a trade-mark is  
founded upon possession and posses-  
sion rests upon the mere act of adop-  
tion and use. Browne on the Law of  
Trade Marks, Sec. 46, and cases cited.  
Registration of a trade-mark is not  
essential to its ownership nor to the  
right to sue for an infringement,  
one object of the statute of regis-  
tration being to afford a conveni-  
ent method of proving an adop-  
tion of the trade-mark; that is, it  
affords *prima facie* evidence of owner-  
ship. A newspaper title merely does  
not seem to be an appropriate subject  
of copyright and therefore the copy-  
righting by the plaintiffs of the title  
to their newspaper cuts no figure in  
this case. Each publication itself  
may be the subject of copyright, but  
not the title distinct from the subject  
matter of publication. "The title of a  
newspaper may possess all the charac-  
teristics of a trade-mark when the  
same is a newly coined term or an ar-  
bitrary symbol; but that is generally  
not so." Browne, Sec. 547.There are numerous cases in which  
courts of equity have enjoined the use  
of a title of a newspaper which bears  
such a similarity to the title of another  
paper which has a right to a trade-  
mark that the casual reader, not the  
close observer, would not readily  
distinguish between the two and  
would be likely to be deceived or  
misled into purchasing the one for the  
other. To show infringement identity  
is not essential; similarity is suffi-  
cient. 32 Fed. R. 94. A few of the  
cases we now cite.The "Evening Post" was not a suffi-  
cient infringement on the "Morning  
Post" to entitle plaintiffs to an injunc-  
tion. *Borthwick v. Evening Post*, 37  
Ch. Div. 449."Chatter Book" was an imitation  
and an infringement of "Chatter  
Box," both books gotten up in the  
same style and both juvenile publica-  
tions. *Estes v. Leslie*, 29 Fed. R. 91.  
"The Northwest News" held no  
piracy of "The New Northwest." 11  
Oregon, 322."El Cronista" held no infringement  
of "El Cronica" cited in 26 Eng.  
and Amer. Encyc. of Law, p. 271."The New Era" is no infringement  
of "The Democratic Republican New  
Era." *Bell v. Locke*, 8 Paige, 75.We are not favored upon any alle-  
gation in the bill with a view of the  
two papers so as to ascertain by in-  
spection whether they are so similar  
in title, size, paper, type, method of  
folding, etc., as to mislead the casual  
observer. We have to pass upon the  
allegations in the bill setting out  
the respective titles. We find that  
they are certainly not *idem sonans*  
Nor would one desiring to buy the  
"Evening Bulletin," with which is  
incorporated the "Independent," be  
likely to be deceived into buying  
"The Independent" instead of the  
former.Upon the face of the bill we fail to  
find an infringement of the title of the  
plaintiffs' present newspaper. But  
the plaintiffs claim in argument that  
they still own the title, as a trade-  
mark, of their former paper, "The In-  
dependent," and they have never aban-  
doned it. There is no exact averment  
in the bill that they own this title,  
but it may be inferred from other al-  
legations. If the plaintiff still own the  
trade-mark, "The Independent," then  
the publication of the defendant's pa-  
per is an infringement, for the titles  
are identical. The question remains,  
therefore, do the plaintiffs still own  
this trade-mark or have they lost it  
by abandonment? A trade-markmay be lost by voluntary abandon-  
ment. Mere non-user is not abandon-  
ment. But intentional abandonment  
of the use of a trade-mark is intention  
of the abandonment of the right to  
the trade-mark. Property in a trade-  
mark cannot be acquired or retained  
independently of the article which it  
symbolizes. It differs from a copy-  
right or a patent, for the owner of  
these may retain them, though he  
may have abandoned all intention to  
make use of them. As ex-  
pressed by the Court in *Cand-  
lish, Swan & Co. v. Deere  
& Co.* 54 Ill. 437, "It is the actual use  
of the trade-mark affixed to the mer-  
chandise of the manufacturer and this  
alone which can impart to it the ele-  
ment of property." Judge Wallace  
in *Atlantic Milling Co. v. Robinson*  
et al., 20 Fed. R. 218, says, "The right  
to the exclusive use of a word or sym-  
bol as a trade-mark is inseparable  
from the right to make and sell the  
commodity which it has been appro-  
priated to designate as the production  
or article of the proprietor. It may  
be abandoned if the business of the  
proprietor is abandoned."The bill in our opinion shows  
deliberate abandonment of the pub-  
lication of the old "Independent" and  
the use of that name as a trade-mark  
— but with the intention to retain the  
ownership of the mark itself. This,  
as we have seen, is impossible.The authorities do not consider  
mere suspension of the manufacture  
of an article without evidence of an  
intention to abandon as sufficient to  
destroy the right. *Crowley v. Light-  
fowler*, Law Reports, 2 Ch. 478. "It  
would be absurd to suppose that a  
person lost his trade-mark by not put-  
ting more goods on the market when  
it was glutted." *Mouson & Co. v.  
Boehm*, 10 Ch. Div. 406.But the bill shows not merely the  
non-user by plaintiff of the newspaper  
"The Independent" but the publish-  
ing of a different paper with a differ-  
ent title, which seems to us to show  
intention to abandon the title "The  
Independent." We think the de-  
murrer was properly sustained. Ap-  
peal dismissed.E. P. Dole for plaintiffs; P. Neu-  
man for defendants.  
Honolulu, November 12, 1895.

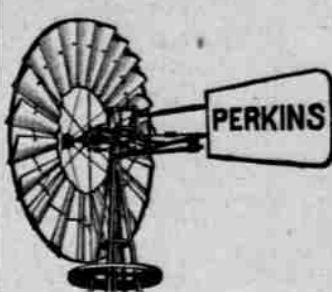
## Burning Pain

Erysipelas in Face and Eyes  
Inflammation Subdued and Tor-  
tures Ended by Hood's."I am so glad to be relieved of my tor-  
tures that I am willing to tell the benefits I have  
derived from Hood's Sarsaparilla. In April  
and May, I was afflicted with erysipelas in my face  
and eyes, which spread to my throat and neck.  
I tried divers ointments and alternatives, but  
there was no permanent abatement of the burn-  
ing, torturing pain, peculiar to this complaint.  
I began to take Hood's Sarsaparilla andFelt Marked Relief  
before I had finished the first bottle. I con-  
tinued to improve until, when I had taken fourHOOD'S  
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CURESbottles, I was completely cured, and felt that a  
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plaint had forever vanished." Mrs. E. E.  
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Nitrate of Soda,  
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grind corn or barley; cut fodder, turn a grind-  
stone and saw your wood.Wooden Towers can be erected if pre-  
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and treatment of Mental and Nervous Diseases. The buildings are capacious and comfort-  
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